IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-876

FLOYD KENNETH SMITH, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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LIST OF AUTHORITIES

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The Petitioner FLOYD KENNETH SMITH respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered on September 27, 1978; Appellant's Motion for Rehearing denied on November 15, 1978.

OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Texas is unreported. A copy of same is reproduced in Appendix "E" hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and Rule 19 (1), Revised Rules of the Supreme Court of the United States of America.

QUESTIONS PRESENTED

Whether the Petitioner was denied and deprived of his right of confrontation as guaranteed by the Sixth Amendment to the Constitution of the United States of America, made applicable to the State of Texas by the Fourteenth Amendment, when the trial court judge denied and refused to allow the Petitioner to ascertain the whereabouts of the State's star witness, Felix Ybarra, or to ascertain "where he is now" or "where he now resides"?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV

> " * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND SUMMARY OF THE FACTS REGARDING THIS ISSUE

On August 14, 1974, the Petitioner filed an Application to take the oral deposition of one Felix Ybarra. (See Appendix "A"). (See also Vol. I, commencing with page 25 of the Record on Appeal on file with the Court of Criminal Appeals). This was denied. Cf. Chapter 39, Code of Criminal Procedure, State of Texas.

On June 19, 1974, a hearing on the Petitioner's Pre-Trial Motions was held. (See Vol. I, Record on Appeal, commencing with page 100). As to the testimony adduced, from one Warren Johnson, concerning the issue presented, see Appendix "B". (See also Vol. I, Record on Appeal, commencing with page 104).

On July 1, 1974, a further hearing on the Petitioner's Pre-Trial Motions was held. (See Vol. I, Record on Appeal, commencing with page 182). As to the testimony adduced from Felix Ybarra, see Appendix "C".

Also, prior to trial, on March 25, 1975, as to this issue, the Record on Appeal reflects the following. (See Record on Appeal, Vol. I, commencing with page 252 and Appendix "D").

As to Ybarra's testimony adduced during the trial, the Court's attention is directed to the opinion of the Court of Criminal Appeals. (See Appendix "E"). (See also Record on Appeal, Vol. II, commencing with page 413).

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

This Honorable Court, speaking through Mr. Justice Stewart, in *Smith v. Illinois,* 390 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968), pointed out, to have effective cross examination and the effective right of confrontation, that:

> The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. (959).

In his discussion, for the Court's Majority, as to the earlier decision of *Alford v. United States,* 282 U.S. 687, 75 L.Ed. 624, 51 S.Ct. 218, His Honor said:

> In *Alford v. United States,* 282 U.S. 687, 75 L.Ed. 624, 51 S.Ct. 218, this Court almost 40 years ago unanimously reversed a federal conviction because the trial judge had sustained objections to questions by the defense seeking to elicit the "place of residence" of a prosecution witness over the insistence of defense counsel that "the jury was entitled to know 'who the witness is, where he lives and what his business is.'" 282 U.S., at 688-689, 75 L.Ed. at 626. What the Court said in reversing that conviction is fully applicable here:
>
> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the

> weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . .
>
> ". . . The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. . . .
>
> . . . .
>
> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. . . . But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination. properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. . . . But no such case is presented here. . . ." 282 U.S., at 692-694, 75 L.Ed. 627-629.

In *Pointer v. Texas,* supra, the Court made clear that "the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding. . . ." 380 U.S., at 407-408, 13 L.Ed.2d 928. In this state case we follow

> the standard of Alford and hold that the petitioner was deprived of a right guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution.

Here, as reflected by the Record on Appeal, see supra, the Petitioner was denied his Constitutional right of confrontation as guaranteed by the Sixth Amendment to the Constitution of the United States of America, applicable to the State of Texas through the Fourteeenth Amendment of said Constitution, when the trial court denied the Petitioner the right to ascertain the correct address of the State's main witness Felix Ybarra. The limitation as to asking the witness his "whereabouts" or "where he is now" or "where he now resides" deprived Petitioner "the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test." The Petitioner was thus denied his right to confrontation of the witness Ybarra.

This Honorable Court, in *Pointer v. Texas,* 380 U.S. 400, 12 L.Ed.2d 923, 85 S.Ct. 1065 (1965), said:

> This Court in *Kirby v. United States,* 174 U.S. 47, 55, 56, 43 L.Ed. 890, 893, 894, 19 S.Ct. 574, referred to the right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all the States composing the Union." Mr. Justice Stone, writing for the Court in *Alford v. United States,* 282 U.S. 687, 692, 75 L.Ed. 624, 628, 51 S.Ct. 218, declared that the right of cross-examination is "one of the safeguards

> essential to a fair trial." And in speaking of confrontation and cross-examination this Court said in *Greene v. McElroy,* 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400:
>
> "They have ancient roots. They find expression in the Sixth Amendment which provides that in all
>
> *[380 U.S. 405]
>
> *criminal cases the accused shall enjoy the right, 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion." 360 U.S., at 496-497, 3 L.Ed.2d at 1391 (footnote omitted).
>
> There are few subjects, perhaps upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witness against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver,* 333 U.S. 257, 92 L.Ed.2d 682, 68 S.Ct. 499, this Court said:
>
> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, at a minimum a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U.S., at 273, 92 L.Ed. at 694 (footnote omitted). (13 L.Ed.2d 926, 927).

Pointer, supra, made applicable the right of confrontation guaranteed by the Sixth Amendment to the States by virtue of the Fourteenth Amendment.

> A major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him. (13 L.Ed.2d 928).

For these reasons, if no other, the Petition for Certiorari should in all things be granted.

CONCLUSION

For all the reasons stated herein, the Writ of Certiorari should be in all things granted in this Cause. The ruling and Judgment of the Court of Criminal Appeals of the State of Texas, made and entered on September 27, 1978, and November 8, 1978, should be reversed and this Cause should be remanded to the said Court of Criminal Appeals of the State of Texas to enter an Order reversing its former judgment and remanding this Cause for a new trial to the 174th Judicial District Court of Harris County, Texas.

Respectfully submitted,

Marvin O. Teague

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CERTIFICATE OF PROOF OF SERVICE

I, Marvin O. Teague, Attorney for Petitioner, Floyd Kenneth Smith, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari has been deposited in the United States Mail, postage prepaid, certified, and properly addressed to Respondent's Counsel, Honorable John L. Hill, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711, this the 30th day of NOVEMBER, 1978.

Marvin O. Teague

MARVIN O. TEAGUE

APPENDIX "A"

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
174th JUDICIAL DISTRICT

NO. 213,817

THE STATE OF TEXAS

v.

FLOYD KENNETH SMITH

Filed: August 14, 1974

APPLICATION OF DEFENDANT TO TAKE
ORAL DEPOSITION OF WITNESSES

Comes Now FLOYD KENNETH SMITH, through his attorney, John Lohmann, III, and moves the Court for an Order permitting him to take the oral deposition of Warren E. Johnson, Special Agent, Bureau of Alcohol, Tobacco & Firearms, and of Felix Ybarra, a confidential informant, insofar as such testimony would relate to the proceedings which resulted in the indictment in Cause No. 213,817, and in furtherance of such application would show the Court the following:

I.

Defendant moves pursuant to Article 39.02, Code of Criminal Procedure, to take such depositions on the grounds that their testimony is material and that it is necessary to take the depositions in order to prevent

failure of justice. That such testimony being necessary and material to the defense of the action, and, without the relief requested herein, the Defendant would be seriously prejudiced in his right to prove his innocence of the charge made against him.

II.

That in support of this application, an affidavit is attached.

WHEREFORE, it is requested that the Court enter an Order appointing, under Article 39.03, Code of Criminal Procedure, a qualified party, specifically naming same and the time when and place where such depositions shall be taken.

Respectfully submitted,

/s/ JOHN LOHMANN, III
JOHN LOHMANN, III

Attorney for Defendant
711 Fannin Building, Suite 401
Houston, TX 77002
225-0727

ORDER

The above and foregoing Motion was duly presented to the Court and after due consideration, the Court is of the opinion that the same should be and it is hereby (GRANTED) (DENIED), to which action of the Court the Defendant duly excepted, and it is ordered that this Motion and Order shall be made a part of the record hereof.

By: _____
Judge Presiding

CERTIFICATE

I, JOHN LOHMANN, III, Attorney for the Defendant, do certify that a true copy of the foregoing Motion was handed, in person, to the attorney representing the State on the 11th day of August, A.D. 1974.

/s/ JOHN LOHMANN, III
John Lohmann, III

APPENDIX "B"

WARREN EARL JOHNSON,

called as a witness on behalf of the Defendant, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions By Mr. Lohmann

Q. Please state your name.
A. Warren Earl Johnson.
Q. By whom are you employed, Mr. Johnson?
A. U.S. Treasury Department, Bureau of Alcohol, Tobacco and Firearms.
Q. How long have you been employed by them?
A. Approximately three years.
Q. In your capacity in your line of work have you had occasion to meet Floyd Kenneth Smith?
A. Yes sir, I have.
Q. Did these meetings and the circumstances resulting therefrom result in this particular case which is on trial here today?
A. Yes, sir.
Q. Mr. Johnson, you have indicated you have certain tapes. Is that right, sir?
A. Yes sir, I do.
Q. Are these tapes made by you or one of the agents?
A. Yes sir, they are.
Q. Are all the tapes made by you and one of the agents?
A. Yes, sir.
Q. Did you at any time obtain through any other

agent or by yourself any tapes from the home of Mr. Floyd Kenneth Smith?
A. No sir, I have never been to the home.
Q. Do you have personal knowledge of any tapes whch were obtained from the home of Floyd Kenneth Smith?
A. No sir, I do not.
Q. Alright, sir, can you tell me the full name of the party to which also was involved as a witness in this particular case being a Felix—I don't know his last name?
A. It is Ybarra, Y-b-a-r-r-a.
Q. And where is he now, sir?

Mr. Holmes: I object to that. That is not material, if it please the Court.

Mr. Lohmann: Your Honor, I believe it is material since I am asking him with regard to discovery and inspection pertaining to facts material as to whether Mr. Ybarra was a material witness to this case and I believe he is material to this cause of action and I have a right to know his whereabouts so he can be subpoenaed.

Mr. Holmes: If it please the Court, I will be happy to subpoena Mr. Ybarra and give the Court the promise that he will be here. May I have the witness on Voir Dire?

The Court: Yes, sir.

VOIR DIRE EXAMINATION

Questions by Mr. Holmes:

Q. Mr. Johnson, do you know whether or not immediately following the indictment in this cause an attempt was made on Mr. Ybarra's life?

A. Yes, sir.

Mr. Holmes: That's all we have, Your Honor, and we object to the question in open Court here of where the man is.

DIRECT EXAMINATION (Continued)

Questions by Mr. Lohmann:

Q. At the time an alleged attempt was made on his life was Mr. Smith in custody and in control of police agencies?

Mr. Holmes: I stipulate to that, Your Honor, that the answer to that is yes.

Mr. Lohmann: I will not stipulate with the State. I would like the witness to answer the question.

The Court: Alright.

A. (By witness) Yes sir, he was in custody as far as I know, sir.

Q. (By Mr. Lohmann) Alright, and he was with you on numerous occasions at the time that you met with Mr. Smith?

A. Twice, sir.

Q. Alright, was he with you on any occasion at which you made any recordings?

A. No, sir—Yes, sir, I am sorry. There was an attempt, but it wasn't successful.

Q. Alright, he was with you when certain conversations were had pertaining to this particular case?

A. Would you repeat it? . . .

Q. He was in your presence and the presence of Mr. Smith when certain conversations were had which pertained to this particular case?

A. Yes sir, he was.

Mr. Lohmann: Your Honor, I would ask at this particular time to have his whereabouts known so that I can issue a subpoena for him for certain other motions to see whether certain evidence can be adduced from him which are material and relative and I think it is necessary for the defense of the Defendant.

Mr. Holmes: If it please the Court, I will be happy to have the gentleman here at any time the Court says, but I object to his present whereabouts being offered in this Courtroom.

Mr. Lohmann: Your Honor, I don't think there has been any showing of the reason why his whereabouts are not known by Mr. Johnson. Mr. Johnson, is he with a police agency?

A. (by witness) No. sir, he isn't.

Q. (by Mr. Lohmann) Is he an informant?

A. Yes sir, he is.

Q. Is he paid by you or is he under compensation by you to act as an informant?

A. No sir, he is not.

Q. Does he help you in making certain other cases also?

A. I have only worked with Mr. Ybarra on one particular case.

Q. And that particular case is this case here?

A. Yes sir, that's correct.

Q. Alright, he was in fact present when you and Mr. Smith met and had certain conversations?

Mr. Holmes: May it please the Court, I object to this as being repetitious.

The Court: Alright, let's get on with it, Counsel.

Mr. Lohmann: Alright, Your Honor, I am at this time going to ask that his whereabouts be made available to the Defendant so that preparation of his defense can be made.

The Court: Do you intend to use this man as a witness?

Mr. Holmes: Yes sir, Your Honor, we do and we will have him available if he choses to talk to Counsel at any time he says and at any place he says, but we object and we do not want this witness to testify as to the man's present whereabouts even if he knows it.

Mr. Lohmann: Your Honor, I believe the State has now made the statement that he intends to use him as a witness and I believe that since he is going to use him as a witness I have a right to know his whereabouts so that information can be obtained in preparation for the defense of Mr. Smith.

Mr. Holmes: If it please the Court, if his whereabouts are released we would do nothing but move him again. I will make him available to Counsel at what ever time he says to meet with his schedule, but I am going to object strenuously as to releasing his present whereabouts.

Mr. Lohmann: If that be the case, Your Honor, can we set a date certain or within the forthcoming week so that depositions may be taken of Mr. Ybarra?

Mr. Holmes: If it please the Court, I object to depositions since they are not allowed under the rules. If he

has anything material to these Motions certainly we will make him available.

Mr. Lohmann: May it please the Court, Your Honor, he has stated that he is a witness for the State and that he intends to use him and that he will be made available. I think that if this is the State's position the defense should be allowed to take his deposition since he is not allowing me to obtain the whereabouts of this man and he has indicated that he will be made available.

The Court: Alright now, Gentlemen, The Man—an attempt has been made on his life and this Court is not going to compel the witness at this time to divulge his whereabouts. The Court will assure you that if the man wants to talk to you, you will have an opportunity to talk to him prior to trial.

Mr. Lohmann: Your Honor, may we have a date certain so that I can talk to him since he has said he will be made available?

The Court: When is the case set, gentlemen?

Mr. Holmes: July the 1st, Your Honor.

The Court: Alright, do you have any ideas on when—

Mr. Holmes: We will make him available at Counsel's schedule. Whatever time is agreeable to Counsel is fine with the State.

The Court: Alright, you will have an opportunity to visit with him prior to trial. Of course, if you want to take a deposition you will have to comply with the Code on that. At this point the Court will assure you that you will have an opportunity to visit with the witness prior to trial.

Mr. Lohmann: May it please the Court, Your Honor, may this be made for tomorrow afternoon?

A. (by witness) I don't know his exact whereabouts now, sir.

Mr. Holmes: We will make an effort to have him tomorrow afternoon and if not tomorrow afternoon we will get him the next day.

The Court: Where do you want to meet, Gentlemen?

Mr. Holmes: May I suggest the conference room of our office.

Mr. Lohmann: I have no objection.

The Court: Alright, proceed.

Q. (by Mr. Lohmann) Mr. Johnson, other than these tapes did you make any written memorandums of conversations you had with Mr. Smith?

A. Yes, I made investigative reports.

Q. You have in fact made written memorandums of conversations you have had with the defendant Smith?

A. Only partially, sir.

Q. Alright, sir, do you have those in your possession?

A. No sir, I do not.

Q. Are they in your control?

A. Yes sir, they are.

Q. Do you have any statements signed by Mr. Smith?

A. No sir, I do not.

Q. So, everything that you have which pertains to this case is either in tape recordings or written memorandums of conversations you have had with Mr. Smith?

A. Everything in connection with the case?

APPENDIX "C"

(On July the first, 1974, the following Hearing on Motions was had:)

Mr. Holmes: As a matter of the further Motion for Discovery filed by the Defendant in the Floyd Kenneth Smith matter, Cause Number 213,817, the State calls Mr. Ybarra.

FELIX YBARRA,

called as a witness on behalf of the State, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Holmes:

Q. Would you state your name for the record, please?

A. Felix Julius Ybarra.

Q. Mr. Ybarra, are you here today in response to a subpoena to testify in the trial of the Floyd Kenneth Smith case?

A. Yes, sir.

Q. Do you understand that there have been motions filed by the defense in this case asking that you be made available to the defense attorney to talk to him about the case? Do you understand that?

A. Yes, sir.

Q. Do you understand that no one can force you to talk to an individual nor can anyone force or suggest to you not to talk to an individual about the case if you do not desire to. Do you understand that?

A. Yes, sir.

Q. Knowing that are you desirous of meeting with and discussing the case with either Mr. Floyd Kenneth Smith or his Counsel?

A. No sir, I will not.

Mr. Holmes: Pass the witness.

CROSS EXAMINATION

Questions by Mr. Lohmann:

Q. Mr. Ybarra, where do you reside?

Mr. Holmes: I object to that on the grounds previously stated.

The Court: Counsel, I will not let you circumvent the Court's ruling. He doesn't want you to know where he resides and I am not going to force him to answer that because of the fact that if he doesn't want you to know where he lives or anyone to know where he lives I am not making him answer it.

Mr. Lohmann: Are you on the payroll or do you work or receive compensation from anybody with Harris County, Texas and more particularly the Narcotics Division?

Mr. Holmes: That is not material to these proceedings.

Mr. Lohmann: I will show the relevancy.

Mr. Holmes: I will ask that he do so now.

The Court: Counsel, he said he did not want to talk to you and you might ask—the only thing I am going to let you ask him at this point is why he doesn't want to talk to you, but I am not going to force him here to be interrogated.

Q. (By Mr. Lohmann) Did you have a conversation in the past concerning the case which is set here today with Mr. Floyd Kenneth Smith, this particular case?

Mr. Holmes: I will stipulate the answer to that would be yes.

Mr. Lohmann: I don't want a stipulation from the District Attorney's office.

The Court: What is the purpose of the question, Counsel?

Mr. Lohmann: I want it on the record if he is going to be a material witness if he had a conversation concerning this case for which my client is accused of Solicitation of a Capital offense and it would be or could be used during the course of the trial and I think it's highly relevant and I am going to file some various motions and I think this will be the basis for the motions.

The Court: Counsel, the only purpose of this hearing as I understand it is to get in the record of this cause that this witness does not want to talk to you. You say you are going to get out depositions. That's fine. If he is present and testifies in this case which he may or may not do, of course, you will have a right to cross examine him.

Mr. Lohmann: May I ask him why he refuses to talk to me?

The Court: Yes, sir.

Q. (By Mr. Lohmann) Why is it you are refusing to talk to me?

A. I am not familiar with the procedures that are going on right now. This is the first time I have ever

been in Court and I am not familiar with it and I would like to familiarize myself with the procedures. I don't know what you are saying. You can clarify it all you want.

Q. Is that the only reason you are refusing to testify?

A. I am not familiar with what you are trying to get out of me.

Q. I was just going to ask you some questions about the case.

A. When I am put as a witness on the case then I will testify.

Q. Sir, you are a witness on the case. You were just served with a subpoena, were you not?

Mr. Holmes: Your Honor, he is arguing with the witness.

The Court: The record will speak for itself.

Q. (By Mr. Lohmann) Is that the only reason you are refusing to testify?

A. As I understand it this is not the trial. This is just a Pre-Trial or a Pre-Trial Hearing.

Q. Did you understand my question, Mr. Ybarra?

A. Yes, sir.

Q. Is that the only reason you are refusing to talk to me or Mr. Floyd Kenneth Smith is you don't know the procedures of this particular Court?

A. There is no reason why I should answer that.

Mr. Lohmann: If it please the Court, will the Court instruct him to answer that?

Mr. Holmes: The State knows of no authority that the witness's reason for not talking to the defense counsel need be stated.

The Court: He said he did not want to testify. You may leave the stand. That's all. File your motions, Counsel.

Mr. Lohmann: Is the Court stopping the proceedings without any further questions?

The Court: Yes, sir.

Mr. Lohmann: At this time I would like to call Mr. Martinez.

APPENDIX "D"

1974. So, may we proceed?

Mr. Lochman: I'll agree with Mr. Holmes the State denied our taking depositions. But I disagree with him concerning the fact that the Court was ordered—ordered Mr. Holmes to require Mr. Ybarra to be in my presence and to come talk to me on this thing. And give me one second here, I will be more than glad to show it.

The Court: I say the Court did order the visit with you in the presence of the State's Attorney?

Mr. Lochman: Yes, sir. Yes, sir.

If the Court would read from Page 9, of the records of the testimony of Earl Johnson, which was furnished by the court reporter, Mrs. Fisher, on the 20th day of August, 1974.

The Court: All right. If he wants to talk with you, I will let him talk to you.

Is Mr. Ybarra here?

Mr. Holmes: If it please the Court, I would have to apologize. I think on the 20th of August the State was represented by Ron Woods and that Mr. Woods was not familiar with the Court's previous order and after Mr. Ybarra's testimony, which was given on a date earlier, a trial setting previous to August 20, 1970 whatever it was.

Mr. Lochman: Judge, August 20th is the day it was transcribed. Mr. Holmes was present. In fact his testimony and his line of questioning on this particular item that I hand you.

Mr. Holmes: It's not dated August 20th.

Mr. Lochman: I said it was transcribed on August 28th, 1974.

Mr. Holmes: So what? I don't understand you. What materiality is that?

Mr. Lochman: Well, for identification purposes, I am showing that the court reporter transcribed this thing.

The Court: Gentlemen, unless you can show me some law to the contrary it is not up to a Judge to make a witness—I have overruled the Motion for a Deposition and the witness may talk to you if he wants to but he has a right not to talk to you, as I understand the law.

Mr. Lochman: Judge, I think this particular thing—I asked the whereabouts of Mr. Ybarra so that I might question him to see whether he would be available or not to testify and talk concerning the case.

And because of some particular reason, on account of he had had his life threatened or something, the Court did not allow me to obtain his whereabouts.

The Court: Correct.

Mr. Lochman: The Court then proceeded to ask Mr. Holmes, which Mr. Holmes volunteered to do in allowing me to meet with Mr. Ybarra on a date subsequent to that hearing, which was never allowed. I have never had that opportunity.

The Court: Mr. Holmes, is Mr. Ybarra here?

Mr. Holmes: He was. I will see if he is in the hallway.

The Court: He has a right not to talk. Now, he may volunteer—

Mr. Holmes: He has already expressed the opinion he does not want to, from the stand.

I will bring him back in and get another opinion from him.

The Court: I think he has already made that statement. I am not going to make him talk to you. He has a right not to visit with you.

Mr. Holmes: I have explained to him that counsel for the defense would like to talk to him. I have further explained to him that I really don't care one way or the other. He is free to do what he chooses.

The Court: All right, Mr. Ybarra, do you want to talk to the defense attorney here this morning or not?

Mr. Ybarra: No. I do not.

Mr. Lochman: Will you talk to me concerning this case at all?

Mr. Ybarra: No, sir.

Mr. Lochman: Would you give me a reason why?

Mr. Ybarra: I see no reason why. I just see no reason that would help the case or clear up any matters by my talking to you.

Mr. Lochman: Mr. Ybarra, would you then tell the Court that you are refusing to discuss anything or any questions that I have since you are an integral part of this case, and you will not talk about the case?

Mr. Ybarra: I will speak to you on the witness stand.

Mr. Lochman: And that is the only time you will speak to me whatsoever?

Mr. Ybarra: That is right.

Mr. Lochman: You would not even so much as tell me—

The Court: Counsel, I think he has already answered he is not going to talk to you at all. And I think that pretty well sums it up.

Do you have any other motions, gentlemen, that need to be disposed of?

Mr. Holmes: Your Honor, I think I would ask that counsel not be allowed to ask or to infer that the witness has not heretofore been agreeable to talk to him about the case, in front of the jury. That is not a material matter for the jury's consideration.

Mr. Lochman: I most certainly think that it would be, Your Honor. The fact the way the man has refused to talk to me, showing his prejudice or his bias, since he is a material witness for the State, of his reasons why he won't testify—

The Court: Counsel, now the rules are clear. If you can't take a man's deposition, why then would you be able to do the same thing with the man not being under oath?

Mr. Lochman: Because it is clear that I can take a deposition. It's just that this Court is denying me or disallowing me from taking the deposition.

The Court: Because there was no good cause shown under the statutes. And he is available for trial.

Mr. Lochman: I realize that, Your Honor, but I do feel that I should be allowed to ask him or to go into

his prejudice or his bias or his reasons for not—(inaudible to the reporter.)

The Court: You may not ask him why he has refused to talk to you off the stand. That is so ordered.

Mr. Lochman: Please note my exception.

The Court: All right. Anything further?

Mr. Lochman: Yes, sir. There are some numerous other ones that I would like to get clarified.

The Court: All right.

Mr. Lochman: There are some other motions in the file that if, in fact, they were ruled on, there there are no notations.

The Court: I have ruled and they are of record in the court reporter's notes and you are aware of the Court's ruling. I have gone through them this morning, again, and have ruled on all the Preliminary Motions.

Mr. Lochman: May I see a copy of the State's subpoena?

The Court: The latest ones?

Mr. Lochman: Yes, sir.

The Court: Yes, sir.

APPENDIX "E"

FLOYD KENNETH SMITH,
Appellant

v.

THE STATE OF TEXAS
Appellee

NO. 55,289

Appeal from Harris County

OPINION

Floyd Kenneth Smith appeals from his conviction for the offense of criminal solicitation with intent to commit capital murder wherein punishment was assessed by the jury at ten years.

The record before us is quite lengthy. Briefly summarized, it reflects that on April 25, 1974, Felix Ybarra, acting as a police informant, contacted Bill Harrison in an attempt to purchase two fully automatic machine guns. On May 3, Harrison informed Ybarra that a man named "Smitty" would furnish him with the desired guns. Ybarra confirmed this in a telephone conversation with Smitty and informed federal Alcohol, Tobacco and Firearms agent Warren Johnson of the arrangement. On May 9, 1974, Ybarra represented to Smitty that agent Johnson was his partner in the machine gun purchase. Together, Ybarra and Johnson met Smitty at the 747 Club in Houston. At trial Ybarra identified appellant as the individual previously known to him as Smitty. At the meeting appellant told Ybarra and Johnson that he could

not get the machine guns as fast as they desired and offered them sawed-off shotguns instead. Ybarra and Johnson replied that they still wanted to buy the machine guns at $400 each. Appellant then offered to give them the guns free, plus an additional sum of $4000 if they would murder his ex-wife. Smith stated that he wanted custody of his two children by the marriage and was tired of paying child support to his former spouse. Ybarra and Johnson purported to accept this offer.

On May 17, a second meeting was had between appellant, Ybarra and Johnson at which details of the crime were finalized and Ybarra and Johnson were shown where appellant's ex-wife worked and lived. They were further instructed by appellant to murder Patricia Smith either immediately before she left for work in the morning or shortly after she arrived home. On this same day Patricia Smith was taken into protective custody. She also gave to agent Johnson certain of her personal effects which were used by police in the apprehension of her husband.

On May 20, 1974, agent Johnson met with Bill Harrison and showed him Mrs. Smith's personal property as "proof" that her murder had been accomplished. Harrison presented Johnson with an envelope from appellant containing $2000. He further stated that Ybarra and Johnson would receive the remaining $2000 and the machine guns shortly.

On May 27th, agent Johnson again met with appellant who offered to furnish him with another sawed-off shotgun. When asked by Johnson if he had any regrets about the murder of his wife, appellant replied that he was very happy about the situation. Johnson agreed to deduct

$150 from the balance owed him for Patricia Smith's "murder" in exchange for which appellant offered him an Auto-Burglar firearm—a fourteen-inch weapon which fires a .20 gauge shotgun shell. After appellant transferred the weapon to agent Johnson's government car he was arrested for the instant offense.

In grounds of error one and two appellant contends that reversal is mandated by the court reporter's failure to record all proceedings at trial. He specifically complains of (1) the reporter's failure to record all bench conversations, and (2) one hundred and forty-five omissions in the transcript of trial testimony which are indicated by the notation "inaudible to the reporter."

With regard to the allegedly omitted bench conferences, appellant emphasizes that prior to trial he filed a motion for the recording of all bench proceedings pursuant to Article 40.09, V.A.C.C.P., and that the reporter's violation of such pretrial motion constituted reversible error. We do not agree. At the outset we observe that appellant raised no objection at trial; neither did he make any attempt to reconstruct the record by an agreed statement of facts by the perfection of bills of exception or bystanders bills, prerequisites for judicial review under Article 40.09(6)(a), V.A.C.C.P.

Application for the provisions of Article 40.09(4), is, moreover, predicated upon a timely and proper request by the defendant. Appellant's pre-trial motion is included in the record before us. It is not a request that all bench conversations be recorded. It is a motion that the court reporter be allowed to approach the bench without expressly asking permission to do so. Even were such a

motion to be construed as a request for the recording of bench conferences, it would nevertheless be insufficient. It does not bear the trial judge's signature above the line provided for it. Typed on the order accompanying the motion are the words "Granted" and "Denied." The order is blank, with no notations reflecting either the granting or denial of appellant's motion. The docket sheet is silent as to any such motion. In sum, there is no evidence before us which shows that appellant either presented a proper request to the court or sought a ruling thereon. The facts of the present case are different from those in Jones v. State, 496 S.W.2d 566 (Tex. Cr. App. 1973); Miller v. State, 472 S.W.2d 269 (Tex. Cr. App. 1971); and Morris v. State, 411 S.W.2d 730 (Tex. Cr. App. 1967), where requests that particular phases of trial proceedings be recorded were refused by the trial judge. Here no such refusal is shown; the record reflects that appellant simply failed to make the necessary request that bench conferences be reported. In the absence of such a proper request, no reversible error is presented. American Plant Food v. State, 508 S.W.2d 598, appeal dismissed 419 U.S. 1098, 95 S.Ct. 767, 42 L.Ed.2d 795 (1974); Henriksen v. State, 500 S.W.2d 491 (Tex. Cr. App. 1973); Jackson v. State, 491 S.W.2d 155 (Tex. Cr. App. 1973); Palka v. State, 435 S.W.2d 525 (Tex. Cr. App. 1968).

With regard to the one hundred forty-five instances in the record where words or phrases are noted as being "inaudible to the reporter," the State points out that during voir dire defense counsel admitted that his Louisiana accent and rapid speech made him difficult to understand. At a conference held concerning appellant's objections to the record, the trial court noted that more frequently than not during the trial counsel were "both screaming at the same time." In a record which includes almost eleven hundred pages of testimony, the existence of one hundred forty-five "inaudible" words or phrases cannot be taken as conclusive evidence of incompetence on the part of the reporter. Such omissions certainly have not impede[d] this Court's reading of the record.

Appellant contends that the existence of such "inaudibles" has injured his capacity to adequately prepare an appeal but does not point out to us any harm which has resulted from the omission of these phrases. He does not contend that by virtue of these gaps he has been prevented from bringing forth any ground of error.

On November 14, 1975, three months prior to the completion of the record, appellant filed premature objections to the record. He thus indicated his awareness that it contained omissions. On February 13, 1976, defense counsel was notified of the completion of the record yet filed no timely objections to it in accordance with Article 40.09(7), V.A.C.C.P. Hence, nothing is preserved for review. Grounds of error one and two are overruled.

In ground of error number three, complaint is further made of the court's refusal to conduct a hearing on appellant's prematurely filed objections to the record. On March 4, 1976, the trial court convened a conference with defense counsel and the prosecution to determine if a hearing should be held on appellant's objections to the record. At this conference appellant contended that although his objections to the record had been filed prematurely on November 14, 1975, he had nevertheless

requested the court clerk to refile that same document on February 27, 1976, within fifteen days of the record's completion. William Pastor, who was court clerk at the time of appellant's trial, recalled his conversation with defense counsel but stated that he was not a deputy district clerk, did not have possession of appellant's file and had no authority to file documents.

Scott Gordon, a Harris County district clerk, related to the court that defense counsel did indeed ask him to "pull" the objections to the record from appellant's file but did not request that such objections be refiled.

In light of appellant's failure to timely file objections to the record, the trial court found that he had not complied with Article 40.09 of the Code of Criminal Procedure and denied a hearing on the prematurely filed objections. The court did not err in so ruling. Had such a ruling been erroneous, it was nevertheless incumbent upon appellant to perfect a bill of exception thereto. The trial court extended ample opportunity for this to be done and did, in fact, offer appellant an entire afternoon and evening in which to adduce any desired testimony on the bill. The Court informed counsel that he had a noon luncheon engagement, also had to receive a guilty plea and, therefore, had to recess until 1:30 p.m. at which time the bill could be completed. Appellant, resentful that the court recessed, did not appear to perfect his bill due to the "realization that any further efforts in [the] court would be met with . . . bias and indifference."

The alleged attitude of the trial court is wholly immaterial. Appellant declined to perfect his bill of exceptions and no error is presented for review.

Appellant contends the court erred in refusing to admit evidence offered to show animus and motive behind the testimony of Patricia Smith. The specific items of evidence sought to be admitted were (1) a tape recorded conversation between Patricia Smith and her attorney in which she expressed surprise at his attempt to kill her and (2) her statement of hostility for her husband uttered at a prior child custody hearing.

The tape recording which appellant introduced contained, in part, the following dialogue between Patricia Smith and her lawyer Harold Lloyd:

"PATRICIA: Would you ever have thought that he was capable of that?

"LLOYD: No.

"PATRICIA: I wouldn't either until they let me listen to the tape. It was the most cold-blooded thing I ever heard.

"LLOYD: And you heard them?

"PATRICIA: Yep."

Such remarks on Mrs. Smith's part showed justifiable shock but did not tend to establish either extraordinary animus or improper motive for her testimony at trial. Their exclusion from evidence was harmless. Mrs. Smith's statement at a child custody hearing that she hated her husband "with a purple passion" was not probative on any issue except to show that she did not feel affectionately toward her ex-husband. The jury, through other evidence, had been made well aware of the ill will which existed between the couple. Any error in the exclusion of the remark from evidence was harmless. Patricia Smith's testimony was not even circumstantially corroborative

of that of Ybarra and Johnson; she was not an eyewitness to the offense and did not have any information concerning the crime itself. Under such circumstances the exclusion of her prior statements does not merit reversal. Florio v. State, 532 S.W.2d 614 (Tex. Cr. App. 1976).

Ground of error five alleges that the court erred in admitting testimony of appellant's co-conspirators" (in actuality, Alcohol, Tobacco and Firearms agents) before a conspiracy had been proven by the State. There is no merit in this argument. If this should be called a trial conspiracy, initial proof of a conspiracy is not necessary before the acts and declarations of a co-conspirator become admissible. Mutscher v. State, 514 S.W.2d 905 (Tex. Cr. App. 1974), citing Sapet v. State, 266 S.W.2d 154 (Tex. Cr. App. 1954).

Appellant next contends that the court displayed an attitude of partiality toward the State. In support of this argument, appellant directs our attention to approximately thirty instances in which, he alleges, the court's rulings constituted a comment on the weight of the evidence or were condescending to the defense.

We will not attempt to discuss here each of the numerous remarks and rulings of which appellant complains. We have reviewed the record and find that in the vast majority of instances the court's rulings were neither incorrect nor condescending, even if abruptly made. A number of the incidents in question did not even take place in the jury's presence and, hence, could not have in any way prejudiced the jury. Furthermore, we observe that a substantial lack of trial decorum was displayed by both sides, but especially by defense

counsel. In those instances where reprimands issued from the bench, we find that they were, as a general rule, necessitated by the inappropriate conduct or argument on the part of appellant.

If appellant felt that the court's rulings were made in a condescending or prejudicial manner and that they thereby constituted a comment on the weight of the evidence, it was incumbent upon him to timely object on such grounds. Granviel v. State, 552 S.W.2d 107 (Tex. Cr. App. 1977), cert. denied ____U.S.____, 97 S.Ct. 2642, 53 L.Ed.2d 250; Hernandez v. State, 538 S.W.2d 127 (Tex. Cr. App. 1976); Forbes v. State, 513 S.W.2d 72 (Tex. Cr. App. 1974). At no time did he do so. Error, if any, was thereby waived. Lejeune v. State, 538 S.W.2d 775 (Tex. Cr. App. 1976); Hernandez v. State, supra; Phillips v. State, 511 S.W.2d 22 (Tex. Cr. App. 1974). We cannot conclude, moreover, that any of the court's statements were reasonably calculated to benefit the State or prejudice the jury against the appellant. Reversal is not required. McClory v. State, 510 S.W.2d 932 (Tex. Cr. App. 1974); Hernandez v. State, 507 S.W.2d 209 (Tex. Cr. App. 1974); Barnes v. State, 503 S.W.2d 267 (Tex. Cr. App. 1974); Lee v. State, 470 S.W.2d 664 (Tex. Cr. App. 1971).

Appellant finally argues that the court erred in denying a motion for mistrial voiced in response to the following statements by the prosecution during final argument at the guilt-in-innocence stage.

> "Because you all know there are people in this community that would not take the type of action that Felix Ybarra. . . .
>
> " * * *

"But sometimes the victim and the proposed victim of crimes are entitled to some protection, too. And certainly, good people of this community. . . ."

The prosecutor's remarks were nothing more than a plea for law enforcement. Such appeals to the jury are permissable in final argument and do not constitute error. Hicks v. State, 545 S.W.2d 805 (Tex. Cr. App. 1977); McCall v. State, 540 S.W.2d 717 (Tex. Cr. App. 1977); Phillips v. State, supra.

No reversible error having been presented, the judgment is affirmed.

Per Curiam

(Delivered September 27, 1978)

By: Panel One, Second Quarter, 1978

Composed Of: Douglas, Judge
Phillips, Judge
W. C. Davis, Judge

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

I, Thomas Lowe, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 55,289, styled:

FLOYD KENNETH SMITH

v.

STATE OF TEXAS

Judgment of the 174th Judicial District Court of Harris County, Texas was Affirmed on September 27, 1978, on November 8, 1978, Appellant's Motion for Rehearing was denied, on November 15, 1978 Appellant's Motion for Stay of Execution of Mandate was denied, and on November 15, 1978, Mandate issued.

THEREFORE with the affirming of this Judgment, this cause was disposed of by this Court on November 15, 1978, Appellant having exhausted all remedies in this, the Court of Criminal Appeals of Texas and judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of this Court, at office in Austin, Texas, this the 15th day of November, 1978.

/s/ THOMAS LOWE
Clerk, Court of Criminal Appeals
of Texas

/s/ Sherrie Ericson
Sherrie Ericson,
Deputy Clerk